Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/26750/2014
IA/26748/2014
IA/26751/2014
IA/26752/2014

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham
On 15th September 2015

Decision & Reasons Promulgated
On 1st October 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

ZG (FIRST APPELLANT)
IG (SECOND APPELLANT)
FG (THIRD APPELLANT)
MG (FOURTH APPELLANT)
(ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss L Mair instructed by Malik Legal
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

Rule 14(1) Tribunal Procedure (Upper Tribunal) Rules 2008

1. **I order that the disclosure or publication of any matter likely to lead members of the public to identify any of the Appellants is prohibited. Any breach of this order may lead to proceedings for contempt of court.**

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Decision and Reasons

2. The Appellants are from Mauritius. They are a couple and two minor children born respectively in 2005 and 2008. They appeal with permission against a decision of Judge of the First-tier Tribunal Broe, promulgated on 20th November 2014, to dismiss their appeals against removal. ZG had applied on 5th July 2012 for leave to remain on the basis of Article 8 ECHR, with her husband and the two children as her dependants. On 23rd July 2012 the Appellants requested that the application be varied to be considered under the amendments to the Immigration Rules introduced on 12th July 2012. It was said that the third Appellant was under 18 and had spent a continuous period of seven years in the United Kingdom and therefore met the requirements of paragraph 276ADE(iv). The application was not finally decided until 13th June 2014 and was considered under the provisions of the Immigration Rules in force as at the date of decision.

3. In his decision upon the appeal Judge Broe considered that the correct version of the Immigration Rules had been applied by the Respondent and he dismissed the appeals both with reference to the Rules and under Article 8 ECHR outside the Rules.

4. In the grounds seeking permission to appeal (now standing as the Grounds of Appeal) it was contended that the judge had erred in applying paragraph 276ADE(iv) of the Immigration Rules as they applied at the date of decision rather than as at the date of application. It was said that an unreported decision of the Upper Tribunal **Suthar and Others (IA/02579/2013)** UKUT had been before the judge and its consideration had not been opposed or precluded. That decision indicated that in the particular circumstances prevailing it was the earlier version of paragraph 276ADE(iv) that should have been applied. It was said that by HC760 some aspects of the Rules were amended with effect from 13th December 2012 but specifically excluded were applications to be decided under paragraph 276ADE(iv) made before 12th December, which indicated that the third Appellant should have succeeded outright under the Rules. That proposition was supported by **Suthar**. It was also said that the judge had erred in considering whether it was reasonable for the children to be removed from the UK and had failed to refer to established principles, namely those set out in **LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278**, **E-A (Article 8 – best interests of child) Nigeria [2011] UKUT 315 (IAC)** and **Azimi-Moayed and Others (decisions affecting children); onward appeals [2013] UKUT 197 (IAC)**. Compelling reasons to the contrary or weighty reasons would be required to justify removal. Finally it was said that the judge had erred in his approach to the best interests of the children. He had only considered those interests in the context of the parents leaving the country and without reference to the children's social, cultural and educational ties and their own wishes.

5. Permission was granted on 23rd January 2015 noting that the judge might have applied the wrong version of paragraph 276ADE and erred in considering the best interests of the children. In a response under Upper Tribunal Procedure Rule 24 the Respondent contended that the grounds were misconceived as HC 760 had been

amended by Statement of Changes HC 820. That had made amendments to paragraph 276ADE which applied to all applications decided on or after 13th December 2012. The judge had applied the correct version of the Rules. It was also said that he had had proper regard to the best interests of the children and had asked himself the correct questions. Reference was made to **EV Philippines v SSHD [2014] EWCA Civ 874**. It was said that the judge had also considered Section 117 of the Nationality, Immigration and Asylum Act 2002.

6. At the commencement of the hearing before me Mr Smart for the Secretary of State produced extracts from the Statements of Changes in Immigration Rules HC 760 and HC 820. He said that the latter statement had made it clear that the amended version of paragraph 276ADE was applicable to decisions made after 12th December 2012 notwithstanding when the applications were made. Miss Mair for her part said that she understood that the case of **Suthar** which was relevant had been before the judge at the original hearing. There had been no reference in the decision to that case. She said that even if the new version of paragraph 276ADE(iv) was applicable the Appellant should have succeeded on the facts. There was a great deal of case law on the reasonableness of requiring a child to leave this country. Mr Smart had not had the opportunity to read the case of **Suthar** and I put the matter back for a short time to enable him to do so and for Miss Mair to read the extract from the Statement of Changes HC 820 which had been produced. Mr Smart mentioned that in any event he had doubts as to whether the required certificate under the Procedure Rules had been before the judge with regard to **Suthar**.

7. The point in issue with regard to the version of the Rules applicable was that under the version introduced by HC 194 which takes effect to applications made on or after 9th July 2012 sub-section (iv) reads "is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment); or ...". By HC 760 the words "and it would not be reasonable to expect the applicant to leave the UK" were added "(discounting any period of imprisonment)". It was a moot point therefore as to which version of the Rules was applicable to the decision under appeal.

8. When the hearing resumed Miss Mair stated that it did appear clear that the unreported Upper Tribunal case of **Suthar** had been before the First-tier Tribunal. It had been in the bundle and was referred to in the skeleton argument. She said that the changes in HC 760 had been brought in on 22nd November 2012, four months after the new Rules had initially been introduced in July of that year. HC 760 made it clear that the provisions of paragraph 276 of the Immigration Rules were not affected and under HC 194 the decision should have been decided on the Rules as incorporated in that Statement of Changes. She accepted that the introduction of HC 820 might "muddy the waters" but she submitted that the changes were poorly worded and their impact was not clear. It was difficult to see how they could be read coherently. She accepted that HC 820 had not been referred to in **Suthar**. However she submitted that the changes incorporated in HC 820 did not override what was said in HC 760 and did not explain how they could be read in tandem.

9. She continued that her other two grounds were unaffected. The reasonableness of removal for a child was well covered in existing case law. The term "reasonable" was not defined in the Rules and she submitted that the test of reasonableness was a much lower one than tests such as "insurmountable obstacles" or "no ties". **LD** set out that weighty reasons were required to separate a child from its community. **EA Nigeria** said that weighty reasons were needed where there was a substantial length of residence. A period after the age of 4 years would have greater impact. After the incorporation of the new Rules the case of **Azimi-Moayed** was promulgated. Seven years was a significant period for a child under Home Office policy and the judge should have considered whether there were compelling reasons to separate the older child from the ambient background. The Respondent herself in Immigration Directorate Instructions accepted that it might be difficult to justify removal when there was long residence. Miss Mair submitted that there was a material error by the judge in his consideration of the issue of reasonableness.

10. Finally, and dovetailing with her earlier submission, she said that an assessment of reasonableness had to include the best interests of children. She submitted that the judge's findings were fatally flawed. The best interests were only referred to in his findings at paragraph 34 and very little was said. Such an assessment had to be more far reaching. With regard to the case of **Zoumbas v SSHD [2013] UKSC 74** she said that even if a child was not a British citizen the same principles applied. That was clear from **ZH (Tanzania) v SSHD [2011] UKSC 4**. As to **EV (Philippines) and Others v SSHD [2014] EWCA Civ 874** the children in that case had been raised in the Philippines and had only been in the UK for three years at the date of decision. The essence of the criticism was on the comparative quality of education which is not an argument she was raising. There were no other factors present in **EV** in the current case. In **ZH** even the wrongdoing by the parents could not outweigh the interests of the child. The current case had no negative factors. The other argument was that the best interests of the child had only been decided after it was decided the parents should be removed. In a sense the argument was circular and came back to reasonableness. The fact that the rest of the family had no right to remain was not the end of the matter. But finally she said there was a paucity of reasoning where a child was able to express itself. The judge had before him at page 47 of the bundle a letter from the older child stating why she wished to remain in the United Kingdom and weight should have been placed upon it. It sent out her view.

11. In response Mr Smart said that the judge had not been referred to HC 820 in **Suthar**. HC 820 clearly implemented changes as to the way applications should be treated and was quite clear. With regard to the other arguments the judge had considered the best interests of the child and had referred to cases such as **Zoumbas**. The matters he referred to were more recent cases than those mentioned in the Grounds of Appeal and he did not depart from the guidance given. He appeared to have had regard to the decision in **EV Philippines**. His decision at paragraphs 34 and 35 dealt with the guidance factors. He also properly considered the issues at Section 117 of the 2002 Act. Mr Smart submitted that the judge could not be criticised for the manner in which he reached his conclusions. It was not the order in which a decision

was reached which mattered but the matter viewed as a whole. He submitted that there was no material error.

12. Finally Miss Mair in reply said that the more recently cited cases were on different points. The cases she had referred to were directly on the issue of reasonableness and long residence. The failure to apply those principles amounted to a material error of law in her submission.

13. Having heard those various arguments I reserved my decision which I now give. The first issue is whether the judge applied the correct version of paragraph 276ADE(iv). It was clear that he had before him a copy of HC 760 and the point was argued that the earlier version of that paragraph of the Immigration Rules was applicable. That earlier version appears to be absolute in indicating that residence of a child who had been in this country for seven years would entitle the child to a right to remain on private life grounds. It is correct that HC 760 preserves the earlier version of paragraph 276ADE. However there was a reference in the Response under Procedure Rule 24 to the provisions of HC 820 and Mr Smart helpfully provided a copy of that Statement of Changes. In HC 760 the changes to paragraph 276ADE are mentioned in paragraph 201 of that statement. The relevant part of HC 820 reads as follows:

> "1. In the Implementation section of the Statement of Changes in Immigration Rules HC 760, the changes in paragraphs 201, 202, 224, 226 to 228, 242, 243, 276, 339 to 341, 345 to 353, 358 to 361, 370 to 388, 392 to 394, and 399 to 441 of that Statement shall apply to all applications decided on or after 13th December 2012, regardless of the date the application was made."

In the annexed explanatory memorandum to HC 820 it is stated at paragraph 2.1 in explanation of the purpose of the changes:

> "To apply most of the changes to the Immigration Rules on family and private life contained in the Statement of Changes in Immigration Rules laid on 22 November 2012 (HC 760) to all applications decided on or after 13th December 2012, rather than only to applications made on or after that date. This will provide greater clarity for applicants and for UK Border Agency caseworkers as to the requirements in respect of family and private life applicable to all applications decided from 13th December 2012."

14. The amendments brought into force by HC 820 with effect from 13th December 2012 appear to me to be perfectly clear. The earlier provision preserving the earlier form of paragraph 276ADE in respect of applications made before 13th December 2012 has been revoked and the usual approach that an application should be decided in accordance with the Immigration Rules in force as at the date of decision therefore obtains.

15. Although Judge Broe gave no explanation as to why he found that the new form of paragraph 276ADE was applicable he was clearly right in following that course.

Suthar appears to have been decided without any reference being made to HC 820 and I do not find in these circumstances that it is reliable guidance to be followed. Thus the first of the Grounds of Appeal falls away. The two other grounds relate to the manner in which the judge approached the reasonableness of the children, and in particular the older child, being removed to Mauritius and also their best interests. Miss Mair helpfully stated that the two issues were "dovetailed".

16. In considering whether the judge dealt adequately with these connected issues or whether in doing so he fell into legal error it is necessary to look in more detail as to what he actually considered and decided. At paragraph 21 of his decision the judge stated that he had considered the documents and the evidence and submissions made. At paragraph 24 he recited that the best interests of the children were a primary although not a determinative issue. His substantive findings were as follows:

> "31. I am satisfied that the Appellant and her husband are unable to meet the requirements of the Rules for the reasons set out in paragraph 10 above. The position of the children is not so straightforward and it is the Appellant's case that if the children are to be allowed to remain in this country then she and her husband should be allowed to stay with them.
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> 32. The third and fourth Appellants [F] and [M] were born in this country on 2nd March 2005 and 5th March 2008 respectively. [F] has therefore been in this country for nine years and [M] for six. I accept that they have been in education and see no reason to doubt that they will have formed the social lives that one would expect given their ages. They cannot meet the requirements of the Rules for leave to be granted on the basis of family life because of their parents' circumstances.
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> 33. I have nonetheless given careful consideration to the matter of their private lives under the provisions of paragraph 276ADE. It is the Appellant's case that [F] meets the requirements of paragraph 276ADE(iv) which are that an applicant is under the age of 18 and has lived continuously in the United Kingdom for at least seven years and it would not be reasonable to expect her to leave the United Kingdom. This is the crux of the appeal. [M] cannot satisfy the seven year requirements. Neither her parents nor her siblings have any independent right to remain in this country.
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> 34. There is no dispute that [F] has been in this country since her birth and so has lived continuously in the United Kingdom for at least seven years. I have therefore given careful consideration to whether it would be reasonable to expect her to leave this country. I have noted the content of the Appellant's bundle and accept that [F] is doing well at school. I note that if she leaves it will be with the other members of her immediate family. I am satisfied that it would be in her best interests to remain with

her parents and siblings. She will be going to live in the country of her nationality with her parents who have spent most of their lives there and will be familiar with life in Mauritius. I note that her grandparents live there. Her father's evidence was that she did not speak the 'language of Mauritius' but I note that she is described as fluent in English, the language in use there. I accept that she may have formed friendships appropriate to her age but find that these may be maintained using modern methods of communication.

35. Against that background I am satisfied that it would be reasonable to expect her to leave the United Kingdom. It follows that none of the Appellants were entitled to be granted leave to remain under the Rules."

He then went on to consider matters outside the Rules but the issue again turned on reasonableness.

17. I have had regard to all of the case law to which I was referred. On the basis of the face of the decision I do regard the judge as having taken account of the views and wishes of the older child. He stated that he had considered all of the documents. He referred to her progress at school. He referred to her school friends. He was aware that her best interests were a primary consideration. He took account of her separation from her friends but found that her best interests lay with continuing life with her parents who themselves had no right to remain in this country. This is not a case of one parent having the right to remain and intending to remain and the other not. As was pointed out to me in **E-A** the Tribunal stated that absent other factors a substantial period of residence as a child may become a weighty consideration in the balance of competing interests although during a child's very early years he or she will be primarily focused on self and the caring parents or guardians. Long residence once the child is likely to have formed ties outside the family is likely to have greater impact on his or her wellbeing. The case goes on to note that those who have their families with them during a period of study in the UK must do so in the light of the expectation of return.

18. In **Azimi-Moayed**, which was promulgated after the new Rules came into force, the principles concerning the determination of appeals relating to children were summarised at paragraph 13. Again it was stated that as a starting point it was in the best interests of children to be with both parents and if both parents were being removed then the starting point suggested so should dependent children. It was generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. Lengthy residence in a country other than the state of origin could lead to development of social, cultural and educational ties that it would be inappropriate to disrupt and the absence of compelling reason to the contrary. What amounted to lengthy residence was not clear cut but past and present policies identified seven years as a relevant period. Apart from the terms of published policies and Rules the Tribunal noted that seven years from age 4 was likely to be

more significant to a child than the first seven years of life. Very young children were focused on their parents rather than their peers and were adaptable.

19. In the current case the older child was aged approximately 9½ years as at the date of hearing before the judge and had thus spent in this country five and a half years, somewhat less than seven years following the age of 4, the ages referred to for the purposes of guidance in **Azimi-Moayed**. The parents have been in the country with leave for most of their period of residence and have no criminal record but they have no continuing lawful right to remain here and were always here on a temporary basis. Although the facts of both **Zoumbas** and **EV Philippines** are substantially different the principle referred to in both of those cases decided by Higher Courts is that it is legitimate to look as to whether the parents of children are to be removed in considering the interests of the children. In the current case removal directions had been made against both parents. The judge gave reasons as to why he regarded the best interests of both children to be to remain with their parents. There was no evidence that in Mauritius the children would not be adequately maintained or not able to access education. None was a British citizen. On the evidence before him the judge's conclusions were not irrational or perverse and, although they could have been expressed more fully, were adequately reasoned. I perceive no material error on a point of law which would justify setting his decisions aside.

Notice of Decision

There was no material error of law in the original decision and these appeals therefore stand dismissed.

I have made the order for anonymity set out above.

Signed Date 29 September 2015

Deputy Upper Tribunal Judge French