**UPPER TRIBUNAL**
**(IMMIGRATION AND ASYLUM CHAMBER)** **APPEAL NUMBER:**
**IA/29454/2014**

**IA/29475/2014**
**IA/29471/2014**
**IA/29459/2014**

**THE IMMIGRATION ACTS**

**Heard at: Field House**
**On 24 September 2015**

**Determination Promulgated**
**On 21 October 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MAILER**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**MR SAMUEL JULIUS ALFAZEMA**
**MRS CHRISTINA ALFAZEMA**
**MR KHAMA KELVIN ALFAZEMA**
**MS GLORY ALFAZEMA**
**NO ANONYMITY DIRECTION MADE**

**Respondents**

**Representation**
**For the Appellant: Mr S Kandola, Senior Home Office Presenting Officer**
**For the Respondents: Mr B Hoshi, counsel, instructed by Legal Rights Partnership**

**DETERMINATION AND REASONS**

1. I shall refer to the appellant as the secretary of state and to the respondents as “the claimants.”

2. The secretary of state appeals with permission against the decision of First-tier Tribunal Judge Callendar-Smith promulgated on 23 March 2015, allowing the claimants' appeals against the refusal by the secretary of state to vary their leave to remain, and in consequence her decision to remove the claimants to Malawi.

3. Mr Kandola relied on the grounds of appeal. The first ground was that the Judge allowed the appeals of all four claimants under the immigration rules but only made findings in respect of one of the child claimants pursuant to paragraph 276ADE (1)(iv) of the rules.

4. Mr Hoshi accepted that the Judge should not have allowed the appeal of all the claimants under the rules. That however he submitted was an inadvertent and immaterial error which could be rectified by substituting a decision reflecting what the Judge evidently intended to do, having allowed the appeal in respect of Glory under the rules. In the event, the appeals in respect of the other three claimants should have been allowed under Article 8 of the Human Rights Convention, with reference to s.117B(6) of the Nationality, Immigration and Asylum Act 2002.

5. The second ground related to the Judge's conclusion that it would not be reasonable for Glory to leave the UK as she is at a critical stage in her education, has lived in the UK for ten years and has developed social ties within the UK by virtue of her friendships and extra curricular activities, which includes a Malawian singing group.

6. It is contended that the Judge's approach in this respect has conflated the best interests of the child with what is reasonable, as evidenced by the conclusion at the hearing that “the heart of the matter” before the Tribunal was Glory's best interests [41].

7. It is contended that whilst relevant to the assessment of what is reasonable, the best interests of the child cannot be a primary consideration. During the course of the hearing, Mr Kandola accepted that that was an incorrect statement of the law. The best interests of the child do, on the highest authority, constitute a primary consideration. It is contended however that the Judge's approach “denoted” Glory's best interests as the only consideration, with little regard for the public interest in maintaining an effective immigration control “... which must form part of the holistic fact based assessment incumbent on the Tribunal to undertake.”

8. That meant that the best interests are for Glory to be brought up in a loving and supportive family. If she wishes to study in the UK it is open to her to pursue such studies at a boarding school should her family wish to do so, or to continue her education in Malawi. The disparity in such

provision does not make it unreasonable to expect the family, as Malawian nationals, to avail themselves of it.

9. It is further asserted that the Judge's failure to engage with the public interest in this case renders the conclusion to allow the appeal under paragraph 276ADE (1)(iv) unsound.

10. In granting permission to appeal, First-tier Tribunal Judge JM Holmes held that it is arguable that the Judge's whole approach to this family was flawed and that he either misunderstood or misapplied paragraph 276ADE, sections 117A-D and the guidance from the court of appeal in EV (Philippines). Arguably, the decision disclosed a free wheeling approach to Article 8.

11. Mr Kandola in developing the secretary of state's grounds, submitted that it was difficult to see how all the appellants could succeed under the rules. It is only children who benefit from paragraph 276ADE in this case.

12. Mr Kandola referred to the decision at [47] where the Judge posed the question as to whether it was reasonable to expect Glory and the rest of the family to leave the UK. The Judge found that the secretary of state's analysis did not give sufficient attention or respect to the realities of Glory's position. He could not find any very weighty reasons or strong countervailing factors presented by the secretary of state that would justify her removal. It would have a deleterious impact on her.

13. The Judge then proceeded at [52] to find that because returning the family unit to Malawi would breach the provisions of the Immigration Rules – 276ADE - in respect of Glory's private life, “these appeals must succeed.”

14. He submitted that there was no further analysis. Accordingly, the basis upon which that unreasoned leap was made had not been identified.

15. Mr Kandola submitted that the Judge was required to make a rounded assessment as to why the whole family was entitled to succeed. They cannot all succeed under the rules. The reliance on Article 8 contained other considerations which had to be met, including a proper public interest inquiry.

16. Accordingly, the error was material and it did not follow that the appeal would necessarily be allowed under Article 8. That applied even if the Judge's finding did not amount to a conflation of the best interests of the child with what was reasonable. However, s.117B is not a stand alone provision.

17. On behalf of the claimants, Mr Hoshi referred to the Rule 24 response. He accepted that the Judge did not indicate which rule he was applying when

stating that he was allowing the appeal of all the claimants under the rules.

18. He referred to the fact that the secretary of state did not seek to challenge the findings and decision relating to Glory that she had met paragraph 276ADE(iv) of the rules. Mr Kandola did not contend otherwise.

19. That error he submitted was not material as the Judge having allowed the appeal of Glory under the Rules had intended to allow the other claim appeals under article 8 with reference to s.117B(6) of the 2002 Act. The Judge correctly observed at [46] that parents of children who succeed under paragraph 276ADE (iv), namely, that it would not be reasonable to expect them to leave the UK, are themselves entitled to remain in the UK on the basis of s.117B(6).

20. He therefore submitted that once Glory succeeded under that paragraph, it was inevitable that the parents had to succeed under s.117B(6) given that the test of reasonableness in that paragraph is the same as that set out in s.117B. In that respect, he relied on the decision of the Upper Tribunal in AM (s.117B) Malawi [2015] UKUT 0260 (IAC). The question posed by s.117B(6) is the same as the question posed in relation to children by paragraph 276ADE (1)(iv). It must be posed in the proper context of whether it was reasonable to expect the child to follow its parents to their country of origin: EV (Philippines). It is not however a question that needs to be posed and answered in relation to each child more than once.

21. Moreover, the fourth claimant, the youngest child, born in the UK on 17 August 2015, had to be granted leave in line with her parents.

22. He submitted that the secretary of state's approach to paragraph 276ADE(iv) was not clear but it appeared that it was being contended that what is or is not “reasonable” for the purpose of paragraph 276ADE(iv) involves carrying out a 'balancing exercise' in which the child's interests are to be weighed against the public interest.

23. That he submitted was incorrect for reasons set out at paragraph 8 of the grounds seeking permission. In particular, the secretary of state's position has been that the rules themselves strike the right balance in most cases. It has not been contended that the balance is struck by reading in elements of Article 8 into the wording of the rules. What is established is that the decision maker must look at the rules in their own right. It is not directly relevant that they may refer to concepts familiar to Article 8. The assessment of Article 8 is then a separate one and depends on the wording of the rule in question, whether that is done within or outside the rules.

24. He submitted that the secretary of state's “novel approach” to paragraph 276ADE(iv) is thus incorrect. No balancing of the public interest against

the personal interests of those concerns needs to be carried out within the rules. It is simply a matter of considering what is “reasonable” taking into account all the circumstances.

25. It is thus contended that the secretary of state's arguments disclose no error of law but merely express dissatisfaction with the Judge's findings. The secretary's grounds at paragraph 2 contain no more than an argument on the facts and displays exactly the reductionist approach for which the secretary of state wrongly criticises the Judge.

26. Mr Hoshi submitted that it would be disproportionate in any event to remove the family, having regard to authorities such as Azimi-Moayed (Decisions affecting children; onward appeals) [2013] UKUT 00197, where the Tribunal noted that seven years from age 4 is likely to be more significant to a child than the first seven years of life. That was a matter which the Judge expressly considered with regard to the position of Glory.

**Assessment**

27. I accept that the Judge has not identified or articulated the basis upon which the appeals of the first, second and fourth claimants were allowed under the Immigration Rules. It is evident that the Judge found that returning the family unit to Malawi would breach the Immigration Rules (paragraph 276ADE) in respect of Glory's private life and it followed that “these appeals must succeed” [52]. It is not disputed that the parents' appeals should not have been allowed under the Immigration Rules.

28. However, it is evident, as submitted, that having allowed the appeal of Glory under the rules, the Judge intended to allow the remaining claimants' appeals pursuant to Article 8 read with s.117B(6) of the 2002 Act.

29. At [46] the Judge considered the fact that parents of children entitled to remain on the basis of 276ADE (iv) are themselves entitled to remain under s.117B(6) of the 2002 Act. That is because it is not in the public interest to remove parents of long residence children. A qualifying child for the purpose of this section includes a child under the age of 18 who has lived in the UK for a continuous period of seven years or more, which is the position of Glory.

30. I do not accept the apparent contention of the secretary of state in the grounds that what is reasonable for the purpose of paragraph 276ADE(iv) involves some kind of balancing exercise where the child's interests are to be weighed against the public interest.

31. There is nothing in the wording itself indicating that such an exercise is required. The question is simply whether the appellant can show that she meets the relevant requirements of the particular rule.

32. In any event, as submitted in the Rule 24 response, the public interest is already built into paragraph 276ADE(iv) in the form of the suitability criteria in s276ADE (i) and the minimum residence threshold of seven years' continuous residence. In Ogindimu [2013] UKUT 00060 [130] the Tribunal held that the weight that the executive attaches to the public interest side of the balancing exercise can largely be gleaned from the new rules.

33. Moreover, as submitted in the response, if paragraph 276ADE(iv) requires a balancing act adopted from a conventional Article 8 approach, the justification for the existence of paragraph 276ADE(i) is hard to justify.

34. The Judge has directed himself in accordance with EV (Philippines) and Azimi-Moayed. He found that the factual matrix of EV differs from this case, as in EV, the appellant with her husband and three children had only been in the UK for less than four years when the original claim was made. Here, the first claimant had been in the UK for much longer and Glory had been here for ten years since arriving as a six year old.

35. The Judge at [47] posed the question whether it would be reasonable to expect Glory and the rest of the family to leave the UK. She had spent almost ten years of her 16 years living in the UK, more than seven of which were with leave to remain, and most of the rest of the period has been within the process of the pursuit of valid and meritorious applications for further leave.

36. Moreover, the Judge had regard to the fact that her engagement with Malawian culture has only been in the context of a UK experience, being part of a Malawian singing group; her short visit to Malawi did not engender any love for living in that country that could act as a counterweight for the life she had grown up with in the UK [48].

37. He found that her social, cultural and educational ties had been formed and developed in the UK, and he took the view that it would clearly disrupt, in an inappropriate fashion, "... the arc of her educational and social progress and expectations here" [49]. Nor were there any weighty reasons or strong countervailing factors presented by the secretary of state justifying Glory's removal - [51].

38. Even though the Judge may have failed to set out clearly the basis upon which the remaining claimants were entitled to succeed under the rules, it is evident that once he found that Glory fell within paragraph 276ADE (iv) - which finding has not been challenged – the other claimants' appeals was bound were bound to be allowed, having regard to s.117B(6) of the 2002 Act. With regard to the fourth claimant, Khama Kelvin Alfazema, born in the UK on 17 August 2015, he is entitled to remain in the UK in line with his parents, pursuant to paragraphs 304-306 of the immigration rules on the basis that they have leave to remain under Article 8 of the Human Rights Act with reference to s.117B(6) of the 2002 Act.

**Notice of Decision**

The secretary of state's appeal in respect of the first and second claimants is dismissed. However, I substitute for the decision of the First-tier tribunal allowing their appeals under the Immigration Rules, a decision allowing their appeals under Article 8.

The secretary of state's appeal in respect of the third claimant, Glory, is dismissed. The decision of the First-tier Judge allowing her appeal under paragraph 276ADE (iv) of the rules shall accordingly stand.

The secretary of state's appeal in respect of the fourth claimant is dismissed. The decision of the First-tier Judge allowing his appeal under the Immigration Rules shall, on the basis set out above, also stand.

No anonymity direction is made.

Signed Date 20 October 2015
Deputy Upper Tribunal Judge Mailer