Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: IA/30052/2014**
IA/30053/2014
IA/30054/2014
IA/30055/2014
IA/32219/2014

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 15 April 2015	**On 29 April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DANIEL AMANOR PECKU
JEANNETTE EKU BOHAM
RONALD OTUTEY PECKU
IVAN OTUTEI PECKU
JUSTIN ORELEANS PECKU

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Ms F Anthony, French & Company Solicitors

DETERMINATION AND REASONS

1. Whilst this is an appeal by the Secretary of State for the Home Department for convenience I will refer to the parties in the determination as they appeared before the First-tier Tribunal.

2. The appellants are husband, wife and their three children. They are all nationals of Ghana. They appealed to the First-tier Tribunal against the decisions of the Secretary of State of 14 July 2014 to refuse their applications for leave to remain on the basis of their private and family life in the UK. First-tier Tribunal Judge Sangha allowed their appeals and the Secretary of State now appeals with permission to this Tribunal.

3. The first appellant entered the UK in 1999 and claimed asylum, his application was refused in May 2002. The second appellant was granted entry clearance as a visitor in 2002 and claims to have entered the UK in 2003 and remained here ever since. The children were born in the UK in 2004 (third appellant), 2012 (fourth appellant) and 2006 (fifth appellant). Therefore at the time of the hearing in the First-tier Tribunal the third appellant was 10 years old and the fifth appellant was 8 years old. The First-tier Tribunal Judge firstly considered each of the appellants' appeals under the Immigration Rules. He found that the first and second appellants could not meet the requirements of paragraph 276ADE. He found that the two elder children (the third and fifth appellants) had been living in the UK continuously for at least 7 years and that it would not be reasonable to expect them to leave the UK. He then found that removal of the parents and younger child would not be a proportionate interference with their right to private and family life in the UK and allowed their appeals under Article 8.

4. In her grounds of appeal to the Upper Tribunal the Secretary of State contends that the First-tier Tribunal Judge erred in that focussing on the educational situation of the children. It is contended that the Court of Appeal in EV (Philippines) & Others v SSHD [2014] EWCA Civ 874 made clear that the desirability of being educated in the UK cannot outweigh the benefit to children of remaining with their parents. The Secretary of State also contended that the First-tier Tribunal Judge failed to undertake consideration of all the circumstances of the appeal. It is contended that the Judge erred in his assessment of the best interests of the children by concentrating only on the children's length of residence rather than all of the factors set out in MK (best interests of child) India [2011] UKUT 00475 (IAC). The third ground of appeal is that these errors affected the proportionality assessment which was further in error because the Judge treated section 117 B as determinative.

5. At the hearing before me Mr Melvin submitted that the main thrust of the grounds of appeal is that the First-tier Tribunal Judge failed to properly consider the removal of the family together, he has singled out the children. He submitted that the Judge failed to have regard to the fact that the family have not had leave to remain since 2003 and that they had

no leave to remain when the application was made or at the time of the hearing. He submitted that the Judge failed to take as his starting point the fact that it is in the best interests of the family to remain together. He submitted that DP5/96 which the Judge considered is not longer applicable and that the Judge should instead have had regard to current case law.

6. Ms Anthony submitted that the proportionality assessment under Article 8 is not a part of the reasonableness assessment under paragraph 276ADE of the Immigration Rules. She submitted that the case of EV (Philippines) is relevant to an Article 8 assessment and not to a decision as to 'reasonableness' under paragraph 276ADE. She submitted that the first question for the Judge was whether the appellants met paragraph 276ADE of the Immigration Rules. She submitted that it is clear that the Judge considered all of the evidence and that the conclusion he reached was open to him on that evidence. Ms Anthony submitted that the decision read as a whole showed that the Judge had in fact had regard to the factors set out in the case law and did not have regard to only one factor. She accepted that the Judge did not mention section 117B (5) in the proportionality assessment but submitted that it is clear that he had in mind that the family are here unlawfully (section 117B (4)) which encompasses presence here which is precarious therefore she submitted the error is not material.

7. In response Mr Melvin submitted that the Judge's findings are not sufficiently clear and that there is no finding dealing with all of the relevant considerations.

Error of Law

8. Mr Melvin relied on the decision of the Upper Tribunal in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC) in support of his submission that the starting point is that the best interests of children is to remain with their family. In that case the Tribunal summarised its findings in relation to decisions affecting children in the head note as follows;

> **"Decisions affecting children**
>
> (1) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:
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> i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
>
> ii) It is 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.

> iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
>
> iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.
>
> v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases."

9. Mr Melvin relied on paragraph (1) (i). However that case is very different from the instant appeal as in that case the family had been residing in the UK for a period of only two months at the date of the First-tier Tribunal. The guidance given by the Upper Tribunal also makes clear at paragraph (1) (iii) and (iv) of the head note that lengthy residence (which has been identified as seven years), particularly from the age of four, can lead to the development of social and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary.

10. In EV (Philippines) Christopher Clarke LJ said;

> "35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.
>
> 36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.

37. In the balance on the other side there falls to be taken into account the strong weight to be given to the need to maintain immigration control in pursuit of the economic well-being of the country and the fact that, *ex hypothesi*, the applicants have no entitlement to remain. The immigration history of the parents may also be relevant e.g. if they are overstayers, or have acted deceitfully."

11. Lewison LJ said;

"58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?

59. On the facts of ZH it was not reasonable to expect the children to follow their mother to Tanzania, not least because the family would be separated and the children would be deprived of the right to grow up in the country of which they were citizens.

60. That is a long way from the facts of our case. 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."

12. On the facts of EV (Philippines) the family had been in the UK for four years at the time of the hearing in the First-tier Tribunal so there was no issue there as to the length of residence of the children of the family. The court identified relevant factors to be taken into account in the context of the assessment of the best interests of the child in the proportionality exercise. In MK the Upper Tribunal gave guidance on the factors to be considered when undertaking an assessment of the best interests of the child in the context of an Article 8 proportionality assessment. However as Ms Anthony rightly submitted the First-tier Tribunal Judge in this case was firstly required to consider the children's appeals under the Immigration Rules which requires determination of a different question from that of proportionality.

13. In the present case the First-tier Tribunal Judge firstly considered the relevant provisions of the Immigration Rules. This was the correct approach being the current approach in light of the current case law in relation to Article 8 and the Immigration Rules. The Judge considered paragraph 276ADE of the Immigration Rules in relation to each family

member. Having found that the parents could not establish a right to stay under paragraph 276ADE he considered each of the children under that provision. I do not see how he could have gone straight to Article 8 in relation to the claimed private lives of the children; this would surely have amounted to an error of law. In considering paragraph 276ADE in relation to the children the relevant provision is as follows;

> **"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
>
> ...
>
> (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; ..."

14. The Judge had therefore to determine, in relation to each child, whether it would be reasonable to expect him to leave the UK. In considering that question the Judge took account of the fact that the oldest child was then over the age of 10 and his brother was over the age of 7, that they are well integrated into British society and well established in mainstream education in the UK [27]. He took account of the fact that they have been living in the UK for at least 7 years [33]. Although not expressly stated as a factor in the reasonableness assessment I accept that the Judge had evidence before him that the parents do not have family left in Ghana [25-26]. I also accept that the Judge took account of the fact that the children were all born in the UK and the parents have not told them that they do not have status in the UK to protect them from being disrupted [42]. It is also clear that he took account of the fact that there are no countervailing factors. I accept that these are all relevant factors along the lines of those identified in EV (Philippines). I accept that an overall reading of the determination is required to establish that the Judge took account of all relevant factors in considering the application of paragraph 276ADE. However I also recognise that the wording of 276ADE (iv) states only that the child should have lived continuously in the UK for at least 7 years and that it would not be 'reasonable' to expect the child to leave the UK. The Judge decided, on the basis of the evidence before him, that it would not be reasonable for two of the children to leave the UK based mainly on their length of residence and establishment in the education system here. I find that this conclusion was open to the Judge on the evidence before him in the context of paragraph 276ADE (iv).

15. Having made that finding the Judge was entitled to take it into account in assessing the proportionality of the interference with the private and family life of the parents and younger child. The Judge was entitled to weigh this as a significant factor in their favour. The Judge did take into account the considerations in section 117B. I do not accept that the Judge can be criticised for not referring to section 117B (5) when he had already taken into account section 117B(4) which is more relevant given that the parents were overstayers and were therefore here unlawfully rather than having 'precarious' immigration status whilst establishing their private and family life. The First-tier Tribunal Judge therefore did take account of the immigration status of the family when assessing proportionality. The Judge properly considered, as he was required to do under section 117B (6), that the parents have a genuine relationship with children who has lived in the UK for over 7 years and that he had decided that it would not be reasonable to expect the children to leave the UK.

16. I am satisfied that the conclusions reached by the First-tier Tribunal Judge were open to him on the basis of the evidence before him.

Conclusion:

The making of the decision of the First-tier Tribunal did not involve the making of a material error on point of law.

The decision of the First-tier Tribunal shall stand.

Signed Date: 27 April 2015

A Grimes
Deputy Judge of the Upper Tribunal