**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: IA/34644/2013

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 7 January 2015**

**Determination Promulgated**
**On 12 January 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**G A P O**
**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr L Tarlow, Home Office Presenting Officer
For the Respondent: Mr M Harris, Counsel instructed by Farani Javid Taylor Solicitors

**DECISION AND REASONS**

1. The respondent is a citizen of Bolivia and his date of birth is 28 May 1972. I shall refer to the respondent as the appellant as he was before the First-tier Tribunal.

**© CROWN COPYRIGHT 2015**

2. The appellant entered the UK having been granted leave as a Tier 2 Migrant on 6 January 2011. His leave was curtailed on 25 August 2012. On 22 August 2012 the appellant made an application for leave to remain. The Secretary of State refused the application in a decision of 14 August 2013 noting that the appellant's partner was here illegally. It was accepted that the appellant has a genuine and subsisting parental relationship with their three children here, but he was not able to meet the requirements of the Rules.

3. The appellant appealed against the decision of the Secretary of State and his appeal was allowed by Judge of the First-tier Tribunal Herbert in a decision that was promulgated on 8 October 2014 after a hearing on 26 September 2014. Permission was granted to the Secretary of State in a decision of First-tier Tribunal Judge Parkes of 24 November 2014. Thus the matter came before me.

**The Hearing Before the First-tier Tribunal**

4. At the hearing before Judge Herbert it was agreed by the parties that the appellant had in fact first entered the UK in 2002 and lawfully resided here until 2010 when he returned to Bolivia before the expiry of his leave to make an application for entry clearance. He returned to the UK on 6 January 2011. His wife lawfully entered the UK as a student in 2002. Her leave expired in 2009. Before the expiry of her leave she submitted an application for leave to remain in respect of her and the couple's three children. Their eldest child G was born on 4 October 2005, their second child J was born on 12 February 2008 and their third child S was born on 12 April 2010.

5. It was noted by the Judge that the appellant's wife's application had been pending for two years and five months. The oldest eldest two children are at school here in the UK and that they were born here. The appellant returned voluntarily to Bolivia in 2010 in order to make an application to return.

6. The Judge of the First-tier Tribunal made a number of positive credibility findings in relation to the appellant and these can be found from [30] of the decision onward. The Judge noted that the appellant and his family had been here lawfully and that they have made a significant contribution to the social and economic fabric of the UK. He noted that they were of good character and are active in their local community. He found that the appellant left the UK when he was required to and made an application to re-enter lawfully. He found that there was a close nexus between his application and that made by his wife and their children.

7. The Judge found that the appellant had no right to remain in the UK under the Immigration Rules. However, he went on to find that the appellant's eldest child would benefit from paragraph 276ADE because it would not be reasonable to expect him to leave the UK. The Judge found that the family

had been here for a long time and were financially independent and that there were no language problems.

8. The Judge noted that the family were faced with a “stark choice” to remain here together or to be removed or hope that the appellant’s wife’s application would be successful. The Judge found that the appellant’s wife suffered from depression when the family were previously separated in 2010.

9. At [51] the Judge made the following finding:

> “I find that it would not be reasonable to expect the appellant’s eldest child to leave the United Kingdom at this stage in his education for a number of reasons:
>
> (i) The eldest child has two younger siblings and therefore if he were to be removed with his father he would lose not only his relationship to his mother for a significant period of time but also to the two younger siblings.
>
> (ii) The eldest child would have a significant break in his education and welfare development on friends and associates as he is nearly 9 years old and for a child of that age such a move is a significant change and one which would not be embarked upon without very good reason.”

10. The Judge found that it would not be in the best interests of the children to be separated from their father and it was not certain how long it would take for the appellant to make an application for entry clearance and for that to be granted. Separation would have a detrimental effect on the appellant’s wife and children.

11. The Judge found at [69] that there was a genuine and subsisting relationship between the appellant and a qualifying child and it would be unreasonable to expect the child to leave the UK (in the context of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002).

12. The Judge found that there would be grave consequences in terms of the children’s education, health and development and welfare should the appellant be expected to leave and this would be exacerbated if the family as a whole left.

**The Grounds of Appeal and Oral Submissions**

13. Ground 1 argues that the Judge was wrong to conclude that it would be unreasonable to require the appellant’s eldest child to leave the UK on the basis that he has two younger siblings present here. The grounds refer to paragraph 51 of the determination.

14. The stark choice referred to by the Immigration Judge was as a direct result of a family who has no basis to remain in the UK. The children had no future right to be educated here. The grounds rely on the case of **Zoumbas v SSHD [2013] UKSC 74**. The case distinguishes between the future right of a British child and a non-EEA child. The grounds also rely on the case of **EV (Philippines) & Ors v SSHD [2014] EWCA Civ 874** and assert that all the family are Bolivian nationals and it would be reasonable to expect the children to adjust to life in Bolivia. It is argued that it was wrong for the First-tier Tribunal to place weight on the appellant's wife's pending application.

15. Ground 2 argues that the Judge erred in finding that the appellant's stay here had not been precarious. It was the respondent's case that the appellant's status here was precarious and as such section 117B (5) applied.

16. I heard oral submissions from both parties. Mr Tarlow indicated that he relied on the grounds of appeal and the case law cited therein. The family chose to remain in the UK and it was a choice available to them to return to Bolivia.

17. Mr Harris submitted that the Secretary of State disagrees with the findings of the Judge, but the grounds failed to show that the decision was perverse. It is clear, having considered the determination as a whole, that the Judge followed the recommended path and was aware of the relevant legal aspects of the appeal. He accepted that paragraph 51(i) was not a viable prospect and not relied upon by the Secretary of State. However, in his view this was not an error of law. The Judge was aware that the appellant and his family were lawfully present in the UK. He accepted that there was a distinction between a British citizen child and a non-EEA citizen child. However, a child's citizenship is not determinative. The Judge was clearly aware of the relevant jurisprudence and specific reference was made to [45], [47] and [61] of the determination.

## Conclusions

18. Ground 1 focuses on the Judge's findings at [51(i)] of the determination (see [9] above).

19. In my view the grounds are misconceived in focusing on [51](i). The Secretary of State was not proposing that the appellant and his eldest son would return together to Bolivia leaving the remaining members of the family here. This was not a relevant consideration for the First-tier Tribunal. However, when the determination is read as a whole it is clear that the Judge did not restrict his assessment of reasonableness to this scenario. He considered at some length the best interests of the children with particular emphasis on the eldest child and he gave adequate reasons why it would not be in the child's best interests to return to Bolivia

and why it would not be reasonable to expect him to leave the UK. I refer specifically to [51(ii)], [61], [62], [63], [67], [76] and [77].

20. It is clear that the Judge recognised the distinction between British citizen children and non EEA Children. However, he also recognised the significance of seven years' residence (this is recognised as a significant period in the Immigration Rules). He noted that the appellant's eldest child had been here for nine years. He properly directed himself at [60].

21. The grounds do not establish that the decision (that it would be unreasonable to expect the eldest child to leave the UK) is irrational or perverse or inconsistent with established jurisprudence. The eldest child is a qualifying child for the purposes of the 2002 Act and in these circumstances (having found that it was not reasonable for him to leave the UK) it follows that the appellant would satisfy paragraph 276ADE of the Immigration Rules. On this basis it was open to the Judge to allow the appeal. Having concluded that it was not reasonable to expect the eldest child to leave the UK the appellants appeal has to succeed under Article 8 pursuant to section 117B (6) of the 2002 Act.

22. There was no material error of law. I maintain the decision of First-tier Tribunal Judge Herbert to allow the appellant's appeal and dismiss the application of the Secretary of State. I have made an anonymity direction in the light of the appellant's children.

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Joanna McWilliam Date 8 January 2014

Deputy Upper Tribunal Judge McWilliam