Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/35184/2014
IA/35193/2014
IA/35194/2014
IA/35195/2014

THE IMMIGRATION ACTS

Heard at Field House
On 13th November 2015

Decision & Reasons Promulgated
On 30th November 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

PRATHVINATHA SHETTY
SOWMYA SHETTY
PRATHAM SHETTY
RAJESHWARI SHETTY

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Bazini (counsel) instructed by Gulbenkian Andonian Solicitors
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of any of these Appellants. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellants against the decision of First-tier Tribunal Judge Wiseman promulgated on 15 May 2015, which dismissed each Appellant's appeal on all grounds .

Background

3. The Appellant's are all members of the same family. The second appellant is the first appellant's wife. The third and fourth appellants are their children. The first appellant was born on 8 November 1963. The second appellant was born on 24 September 1977. The third appellant was born on 24 January 2002. The fourth appellant was born on 22 May 2007.

4. On 25 July 2013 the first appellant applied for leave to remain in the UK outside the Immigration Rules. The remaining appellants were included in that application as the first appellant's dependants. Those applications were refused by the respondent on 9 October 2013. A consent order for reconsideration was made on 27 June 2014, and on 23 August 2014 the respondent refused the applications of new.

The Judge's Decision

5. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Wiseman ("the Judge") dismissed the appeals against the Respondent's decision.

6. Grounds of appeal were lodged and on 7 September 2015 Upper Tribunal Judge Kopieczek gave permission to appeal stating

> "Notwithstanding the First-tier Judge's conclusions under appendix FM on the question of the reasonableness of the minor appellants being required to leave the UK, I consider arguable the point in the grounds in relation to an apparent failure by the Judge to consider paragraph 276 ADE(iv). It is also arguable that there was inadequate analysis of the application of article 8.
>
> "Whilst other aspects of the grounds could be said to amount only to a disagreement with the judge's analysis of the evidence, I do not rule out of consideration any aspect of the grounds."

The Hearing

7. Mr Bazini, counsel for the appellants, relied on the grounds of appeal and was critical of the structure and content of the Judge's decision. He took me through a number of separate paragraphs in the decision, and argued that the decision is tainted by material errors of law because the Judge had conflated consideration of the "reasonableness test" (contained in the immigration rules) with the balancing exercise required to assess

proportionality in terms of article 8 ECHR. He told me that the Judge's consideration of the immigration rules was woefully inadequate because there is no consideration of paragraph 276 ADE(iv). He reminded me that no reference is made to paragraph 276ADE by the Judge. He then questioned whether or not the Judge had gone on to consider article 8 ECHR and reminded me that there is no reference in the decision to section 117B of the 2002 Act. He relied on E-A (Article 8 - best interests of child) Nigeria [2011] UKUT 00315 (IAC), EV (Philippines) and Others v SSHD [2014] EWCA Civ 874, Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197 (IAC) amongst other cases, and told me that the Judge had incorrectly found that factors which mitigated in the appellant's favour counted against the appellants. He told me that the best interests of the children had not been properly considered, and relied on the respondent's own statement of policy which emphasised the manner in which cases involving children who had lived in the UK for more than seven years should be considered. He told me that the Judge's errors had tainted the entirety of the decision and that the decision should be set aside and determine of new.

8. Ms Willocks-Briscoe, for the respondent, told me that the decision does not contain any material errors of law and should stand. She conceded that the Judge does not refer to paragraph 276 ADE of the rules nor is there reference to section 117B of the 2002 Act, but she argued that the correct test had been applied and that the Judge's consideration of reasonableness in terms of appendix FM and paragraph EX(1) was sufficient to encompass consideration of paragraph 276 ADE of the rules. If the Judge had taken another approach it would simply have been repetition. She relied on the cases of Dube (ss.117A-117D) [2015] UKUT 00090 (IAC), Forman (ss.117A-C considerations) [2015] UKUT 00412 (IAC) and AM (S 117B) Malawi [2015] UKUT 260 (IAC), and argued that it is unnecessary for the Judge to rehearse section 117B of the 2002 Act. She argued that the Judge had manifestly considered the provisions of section 117B of the 2002 Act and has carried out an adequate balancing exercise. She urged me to dismiss the appeal and to allow the decision to stand.

Analysis

9. There are deficiencies in the Judge's decision quite simply because the Judge does not refer to section 117B of the 2002 Act nor does the Judge mention paragraph 276 ADE (iv) of the immigration rules. Those are quite clearly errors, but are they material errors of law? The correct test is to consider whether the outcome could have been different if those errors were not present.

10. At [45] the Judge unambiguously states that if the two adult appellants were alone "*…. Their appeals would not stand the slightest chance of success*". Between [47] and [52] the Judge explains that bald statement, and in doing so sets out adequate reasons for rejecting the appeals of the first and second appellants. The focus in this case is quite clearly on the two child appellants. Between [53] & [70] the facts and circumstances pertaining to the two children are carefully analysed.

11. In E-A (Article 8 - best interests of child) Nigeria [2011] UKUT 00315 (IAC) the Tribunal held that (i) The correct starting point in considering the welfare and best

interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indication. Where it is in the best interests of a child to live with and be brought up by his or her parents, then the child's removal with his parents does not involve any separation of family life.(ii) Absent other factors, the reason why a period of substantial residence as a child may become a weighty consideration in the balance of competing considerations is that in the course of such time roots are put down, personal identities are developed, friendships are formed and links are made with the community outside the family unit. The degree to which these elements of private life are forged and therefore the weight to be given to the passage of time will depend upon the facts in each case. (iii)During a child's very early years, he or she will be primarily focused on self and the caring parents or guardian. Long residence once the child is likely to have formed ties outside the family is likely to have greater impact on his or her well-being. (iv)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. (v)The Supreme Court in ZH (Tanzania) [2011] UKSC 4 was not ruling that the ability of a young child to readily adapt to life in a new country was an irrelevant factor, rather that the adaptability of the child in each case must be assessed and is not a conclusive consideration on its own.

12. In EV (Philippines) and Others v SSHD [2014] EWCA Civ 874 it was held that the best interests of the child were to be determined by reference to the child alone without reference to the immigration history or status of either parent (paras 32 and 33). In then determining whether or not the need for immigration control outweighed the best interests of the children, it was necessary to determine the relative strength of the factors which made it in their best interests to remain in the UK; and also to take account of any factors that pointed the other way. At paragraph 35 of EV (Philippines) and Others it was stated that the best interests of children will depend on a number of factors including their age, the length of time that they have been in the United Kingdom, how long they have been in education, the stage that their education has reached, to what extent they have been distanced from the country to which they are to be returned, how renewable their connection with it may be, the extent that they will have linguistic, medical or other difficulties in adapting to life there and the extent to which the course proposed will interfere with their family life or other rights in this country. The longer the child had been in the UK, 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 fell into one side of the scales. If it was 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 was 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. In the balance on the other side there fell 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 claimants had no entitlement to remain. The immigration history of the parents might also be relevant (paras 34 – 37). Although the party

13. Although counsel placed weight on both of those cases, he only placed selected emphasis on the effect of those cases in the balancing exercise. A fair reading of both E-A (Article 8 - best interests of child) Nigeria and EV Philippines indicates that there are aspects of the child's life which must be considered and carry weight in the balancing exercise, but there are other factors which must be considered and the length of time of the child's residence in the UK is not necessarily the only determinative factor.

14. The Judge does not specifically referred to section 55 of the Borders, Citizenship and Immigration Act 2009. In R (on the application of Mine and others) v Secretary of State for the Home Department [2011] EWHC 2337 (Admin) Simons J said that failure to refer to s 55 of the 2009 Act or to the provisions of the UNCRC would not of itself render the decision not in accordance with the law. Neither would citing those provisions automatically make a decision lawful. The relevant consideration was the substance of the decision, not its form. The obligation to act in a way that promoted the welfare of the child and treated its best interests as a primary consideration had to be viewed in this context. In R (on the application of Khadra Ahmed Ali) [2015] EWHC 7 it was said that it was sufficient if the substance of the section 55 duty was discharged and explicit reference to statute or guidance was not required.

15. For each of the child appellants, paragraph 276ADE(iv) of the rules is relevant. That paragraph of the rules states

> "276ADE. 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:
>
> ...
>
> (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;"

16. That paragraph of the rules is not mentioned by the Judge, but when he considers the facts and circumstances of the child appellants, the Judge quite clearly considers that paragraph (276ADE(iv)) to be the relevant part of the immigration rules. The Judge commences [68] by stating "*I do not therefore regard the period of more than seven years in this country as being decisive…*" - quite clearly demonstrating that having considered the evidence in this case he applies the relevant paragraph of the immigration rules. It would have been helpful if the Judge had referred specifically to paragraph 276 ADE (iv), but when time is taken to read the decision it can be seen that the paragraphs of the decision leading to [68] are a consideration of paragraph 276ADE(iv) of the rules.

17. At [50] the Judge specifically refers to part 5A of the 2002 Act, as introduced by the Immigration Act 2014. That is a clear and specific reference to section 117B of the 2002 Act. Despite what is argued for the appellants, it is clear that in the ensuing paragraphs (when carrying out a balancing exercise) the Judge takes account of section 117B of the 2002 Act.

In AM (S 117B) Malawi [2015] UKUT 260 (IAC) the Tribunal held that the statutory duty to consider the matters set out in s 117B of the 2002 Act is satisfied if the Tribunal's decision shows that it has had regard to such parts of it as are relevant.

18. This case turns on the long residence of the child appellants in the UK, and the progress the children have made in education and social circles. It is beyond dispute that they are both gifted children of capable parents. In EM and others (Eritrea) [2012] EWCA Civ 1336 the Court of Appeal accepted "*the favourable account*" they had been given "*of the children's response to education and their unwillingness to be parted from it*". The Court of Appeal also accepted "*as real their fear of returning to the state of street homelessness in which the family previously found itself in Italy*". Nonetheless, the Court of Appeal then went on "*we still have to consider whether there is any real possibility of MA's article 8 claim being upheld on an in-country appeal to an immigration judge. We are satisfied that there is none. Her daughter is now an adult and cannot legitimately have her interests aggregated with MA's. Her son, now 14, is settled in school; but he is here only because his mother has been able for four years to resist removal*".

19. The approach taken in Zoumbas was the same approach taken in Azimi-Moayed and others (decisions affecting children; onward appeals) [2013] UKUT 197(IAC) in which the Tribunal held that (i) 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: (a) 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.

20. The errors made by the Judge are a failure to set out specific reference to the immigration rules and the relevant statutory provisions, so that the decision requires careful reading. Once the decision has been carefully read it can be seen that there is no misdirection in law. It can also be seen that, although the Judge does not spell it out, he has directed himself correctly. The decision that the Judge reaches is one that the appellants do not like, but it is supported by case law. The many positive aspects of this family's lives and the progress that they have made in the UK is not a guarantee of success in their appeal.

21. I therefore find that although the decision contains errors, those errors are not material errors of law because the Judge has not misdirected himself in law; he has, in fact, correctly directed himself in law. He has made findings which were open to him on the evidence available. Those findings led him to a conclusion which was well within the range of conclusions available to the Judge. The errors are stylistic but they do not affect the quality of the decision which is ultimately reached.

22. It is not an arguable error of law for a Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Judge to fail to deal with every factual issue under argument. Disagreement with an Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, or his evaluation of

risk does not give rise to an error of law. Unless a Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible.

Conclusion

23. No material errors of law have been established; the Judge's decision stands.

DECISION

24. The appeal is dismissed.

Signed Date 25 November 2015

Deputy Upper Tribunal Judge Doyle