Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/36451/2014**
IA/38235/2014
IA/39620/2014

THE IMMIGRATION ACTS

Heard at Field House **Sent to parties on**
On 17 November 2015 **On 22 December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

A C S G
B S G
G B D S G

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr S Bellara, Counsel instructed by Western Solicitors
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are Brazilian nationals. The first and third Appellants are husband and wife and the second Appellant is their daughter. She was born in the UK on 26 November 2007. On 3 May 2014 the first Appellant applied for indefinite leave to remain on the basis of ten years continuous lawful residence in the United Kingdom. That application was refused by the Respondent on 8 September 2014. The Respondent concluded that she had not demonstrated ten years continuous lawful residence. The Respondent considered whether the first Appellant qualified under any of the other

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provisions of the Immigration Rules. The Respondent concluded that the first Appellant did not benefit from the requirements of EX. 1 as her husband did not meet the eligibility requirements and her daughter was a Brazilian national and had not lived in the UK for more than 7 years at the date of application. The Respondent also came to the conclusion that the first Appellant could not meet the requirements of paragraph 276ADE of the Immigration Rules as she did not meet the length of residence requirements and there were not very significant obstacles to her integration to Brazil.

2. The third Appellant applied on 29 July 2014 for leave to remain as a Tier 4 student dependent. The Respondent refused the application on 24 October 2014 as the first Appellant did not have leave as a Points Based System Migrant and therefore the third Appellant could not meet the requirements of paragraph 319C(b) of the Immigration Rules. Further, his application was refused under paragraph 322(1A) of the Immigration Rules as the Respondent considered that he had used deception in his application for further leave to remain.

3. The second Appellant applied on 29 July 2014 for leave to remain as a Tier 4 student dependent and her application was refused under paragraph 319 H as the first Appellant did not have leave as a Points Based System Migrant. Consideration was given to section 55 of the Borders, Citizenship and Immigration act 2009 (BCIA) and it was concluded that the interests of immigration control outweighed the possible effect on her that re-establishing family life outside the UK might have.

4. The Appellants appealed the Respondent's decisions and First-tier Judge G A Black dismissed their appeals in a decision promulgated on 3 February 2015. She found that the Appellants did not meet the requirements of the Immigration Rules, found that the third Appellant used false documents in his application and further found that there would be no breach of Article 8 ECHR if the Appellants were returned to Brazil.

5. The Appellants sought permission to appeal that decision which was granted by First Tribunal Judge P J M Hollingworth on 16 June 2015. He granted permission on the basis that arguable errors of law had arisen in relation to the application of section 117C; the period of time spent in the UK in the context of the proportionality exercise; the Article 8 exercise outside the Immigration Rules and the application of the standard of proof in relation to the document verification report.

The Grounds

6. Ground 1 asserts that the First-tier Tribunal erred in its assessment of Article 8 and the best interests of the child. It is asserted that the First-tier Tribunal failed to consider that the 7 year threshold had been crossed by the date of the appeal hearing and that s117B (6) of the 2002 Act, the Rules and also case law acknowledged the significance in private life terms for a child of that time period in the UK. It is also argued that the First-tier Judge failed to

give proper consideration to the significance of the second Appellant's activities outside of her family and that her preference for speaking English was indicative of ties formed in this country. It is asserted that there was a considerable amount of evidence before the Tribunal indicating how the second Appellant had developed a significant private life and identity outside of her family. It is stated that there is no reference to the case law of **E-A Nigeria Article 8 – best interests of child) Nigeria [2011] UKUT 00315)** relied on by the second Appellant. It is further alleged that the First-tier Tribunal failed to consider that the second Appellant should not be blamed for the conduct of her parents; wrongly referred to s117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"); failed to direct herself and make a finding on whether it would be reasonable for the second Appellant to leave the UK; failed to make a clear finding on what is ultimately is in the best interests of the second Appellant and failed to make it clear whether she was considering Article 8 outside the Rules.

7. Ground 2 asserts that the First-tier Tribunal materially erred in her findings at paragraph 38 to 39 of the decision in relation to the use of deception by the third Appellant. The Respondent had produced a document verification report ("DVR"). The grounds of appeal argue that the First-tier Tribunal failed to take into account the detailed submissions in the Appellants' skeleton argument concerning the shortcomings in the evidence. It is asserted that the DVR did not identify that the official contacted had the status to have access to the information about the third Appellant; did not detail what information was checked to demonstrate that the opinion offered by the official was reliable and it was unclear what documents were involved in correspondence between the Respondent and the official. The allegedly correct details of the third Appellant's account were not produced to show that any document contained false information. The third Appellant gave evidence that his bank manager had not been contacted by the Respondent.

The Rule 24 Response

8. The Respondent's response asserts that the First-tier Tribunal Judge directed herself appropriately. The Appellants demonstrated no compelling circumstances to be considered outside the Rules. The reasoning to support the finding that there was a false document was clear and sustainable. Although there may have been a misdirection in relation to the standard of proof required in paragraph 38 it only went on the Appellant's favour. The Judge was entitled to place little weight on the email allegedly from the Appellant's bank. Following **Zoumbas v v Secretary of State for the Home Department [2013] UKSC 74)**, even if it were in the best interests of the third Appellant to remain in the UK, none of the parties were British, their stay had always been precarious and fraud had been relied on to attempt to obtain leave.

The Hearing

9. In submissions Mr Bellara said that it was a striking feature of the appeal that there was no reference to section 55 of the BCIA in the original refusal and that was not considered in the reasons for refusal letter ("RFRL"). The Respondent was fully aware that there was a child and the best interests had to be considered. Counsel asked for the matter to remitted taking into account the family circumstances. That proposal was not taken up by the Judge. The entire assessment was flawed as if one looked to the determination there was no reference to **JO and Others (section 55 duty) Nigeria** [2014] UKUT 00517 (IAC) and s55. The Judge did not consider that the appeal should be considered outside the Rules and there was no formal assessment outside the Rules. Clearly there had to have been a careful extensive examination of the child's best interests. It may be argued that there had been a consideration of the best interest of the child but it did not meet the level of care. That was the most serious defect in the determination. The Judge had referred to s117 C of the 2002 Act and that was not the correct section because it related to foreign criminals.

10. There was also the issue of deception. The Judge had not given sufficient reasons. What appeared to have happened was that the Appellant produced rebuttal evidence. Although not the most material ground it needed to be assessed carefully and the Respondent's evidence did not meet the required standard of proof. It was sufficient to render it unsafe. In addition it was incorrect that there were no reasons not to consider the Appellants' case outside the Rules. There should have been more thorough assessment. The Article 8 consideration was incomplete. The matter should have been remitted. The Respondent should have reconsidered matters in the light of **JO** which was promulgated by the date of decision.

11. Mr Jarvis submitted that the search for error of law was predicated on the grounds on which permission was granted. There was no challenge to the First-tier Tribunal's approach in respect to the argument that the Respondent's decision was unlawful. That was a distinct point. With regard to **JO**, in **MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 223** the President reigned back on some of the findings. The concession made by Mr Jarvis in **MK** was that where the Respondent did not know about the relevant child then it should go back to the Secretary of State. **JO** and **MK** said that the Secretary of State had to show that there had to have been a careful forensic examination of the best interests of the child but where it had taken place it did not need to be remitted. The argument did not show a flaw in the decision. It was not a long determination but the Judge did make reference to the best interest of the child which were considered. Education was considered and extracurricular activities were found to be capable of being replicated in the home country. The substance of the private life was dealt with.

12. The second ground related to the DVR. If one read paragraph 33 and 39 it was plain that there was further evidence provided after the hearing. The Judge did not have a duty to accept that evidence and she dealt with it lawfully. She found that overall that evidence was not weighty enough and not persuasive enough to outweigh the DVR. She gave lawful reasons on the balance of probabilities and it did back up the Respondent’s decision. Paragraphs 38 and 39 of the decision were lawful. At paragraph 39 she gave reasons in detail why she did not give weight to the document from the bank. The findings were open to her. The argument against the findings on the DVR was not strong.

13. Paragraph 40 of the decision was in a slightly grey area. Paragraph 276 (iii) of the Immigration Rules required 7 years residence in the case of a child but both the Rule and the 2002 Act had a reasonableness assessment. There was a danger of challenging the decision on the basis of the word “reasonable” not being used. Any deficiency in relation to the words used was a cosmetic matter. The Judge said at the end of paragraph 40 that she had actually conducted an exercise outside the Rules. She had made reference to the best interests of the child and private life factors. Paragraph 40 was Article 8 compliant. She also took into account that the Appellant failed to meet the Rules. She used the words “qualifying child” and the reference to section 117C was a typographical error. She had dealt with both sides of the balance. The best interests of the child was a discrete matter and then when the proportionality matters came into play then the immigration factors did come into the balance. That was relevant as it was part of the balancing exercise. She was not holding the immigration history against the child as part of the best interest assessment but taking it into account in the proportionality assessment. When one put aside the point that there is a typographical errors and the arguments in and outside the Rule she had taken into account relevant factors. The Appellants’ status was precarious. The decision “did the job”.

14. Mr Bellara said in reply that the proportionality exercise was missing in this decision. At paragraph 40 there was a focus under the Rules. Although the Judge touched on family life there were compelling enough circumstances outside the Rules that would have engaged a further set of circumstances. For example there could have been greater detail about the school. One could not be sure whether the Judge applied a higher stringent test in relation to deception. There seemed to have been a focus on the assessment under the Rules. Mr Jarvis had said that it had been considered but it had not gone far enough. The second stage had not conducted. If the Judge had the deception issue in mind when considering s117 it seemed that the Judge when considering the email evidence could have asked the primary decision maker to verify it. She had simply stated that Respondent had not had time to consider it. There was not enough evidence as to why the higher burden was met. Having referred to s117, there may have been an impact on proportionality. The period of time spent in UK was not assessed properly. If she had s117C in mind the whole assessment was in error.

15. Mr Jarvis submitted that if I were to find a material error of law the case could be retained in the Upper Tribunal. Mr Bellara submitted that it should be remitted to First-Tier.

Discussion and Findings

16. I find that the First-tier Tribunal did not make an error of law in relation to the Article 8 assessment with regard to the second Appellant. The First-tier Tribunal dealt with Article 8 in paragraph 40 of the decision. The Judge entitles that consideration “Article 8 and the Best Interests of the Child”. She concluded, correctly, that the second Appellant could not meet the requirements of paragraph 276ADE as she had not demonstrated 7 years lawful residence prior to the making of the application. She then stated that it was accepted that there was no breach of family life because the family would remain together and be removed to Brazil together. This was also correct because it was conceded by the Appellants at paragraph 31 of the skeleton argument drafted by Mr Harris, Counsel at the hearing. She then moved on to consider the second Appellant’s best interests. She dealt with those best interests and her approach was lawful as she treated those interests as a primary consideration which needed to be addressed first (**ZH (Tanzania)** [2011] UKSC 4). She addressed the evidence as to where the second Appellant’s best interests lay and the fact that reliance was placed on her attendance at school and her extracurricular activities. She found that those activities could be continued in Brazil and were of the usual range pursued by a child of her age. These findings were open to her on the evidence. It is clear that she had regard to the evidence in the Appellant’s bundle from the primary school. The evidence submitted on behalf of the second Appellant in respect of her best interests before the First-tier Tribunal consisted of witness statements from both her parents and a letter from her primary school. The witness statements described the second Appellant’s achievements and extra-curricular activities and her integration into the UK. The letter from her primary school stated that she was doing well academically and that to move her would be a tremendous shock.

17. The First-tier Tribunal accepted that she had established a private life in the UK and had regard to her age, the nature of her activities and her adaptability given her age. The First-tier Tribunal identified that the second Appellant’s “main interest” lay in being brought up by her immediate family. These findings accorded with established case law that correct starting point in considering the welfare and best interests of a young child is 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 (**E-A (Article 8 – best interests of child) Nigeria** [2011] UKUT 00315). Whilst the First-tier Tribunal did not cite **E-A** the decision accords with the ratio of that case.

18. Further, the First-tier Tribunal did not, as the grounds assert, blame the second Appellant for the conduct of her parents. It is clear from the

consistent jurisprudence of the higher courts that the best interests of a child are an integral part of the proportionality assessment under article 8 ECHR and a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent (**ZH (Tanzania** [2011] UKSC4, **Zoumbas v Secretary of State for the Home Department** [2013] UKSC 74)). Further, the best interests of the child are to be determined by reference to the child alone without reference to the immigration history or status of either parent (**EV (Philippines) and others v Secretary of State for the Home Department** [2014] EWCA Civ 874). The First-tier Tribunal found that the elements of the second Appellant's private life could be replicated in Brazil and that her best interests were to be brought up with her immediate family. She made these findings without reference to the immigration history or status of either parent. She was entitled to take account of the fact that the second Appellant had no lawful leave in the UK as part of the proportionality assessment when considering what weight to give to the second Appellant's private life. She found that the second Appellant had failed to meet the requirements of the Immigration Rules as a dependant of a Tier 4 student. That was a factor which she could lawfully take into account in an assessment of proportionality.

19. Whilst the First-tier Tribunal referred to section 117C of the 2002 Act, it is clear that this was a typographical error. It is evident when looking at the decision as a whole and her specific reference to the second Appellant as a qualifying child in paragraph 40 that she knew that none of the Appellants were foreign criminals and did not apply section 117C.

20. It is asserted in the grounds that the First-tier Tribunal failed to consider that the 7 year threshold had been crossed by the date of the hearing and that section 117 B (6) of the 2002 Act applied. I find that this assertion is not correct. The First-tier Tribunal Judge states in paragraph 40 that the second Appellant had resided in the UK for seven years and was a "qualifying child". This was clear reference to section 117 B (6). It is correct that she did not use the word "reasonable" in her assessment. However, I consider that when one has regard to her reasoning in paragraph 40 it is evident that she is assessing the reasonableness of the child leaving the UK. In so doing she took into account the fact that she was here as the dependant of a student whose residence was in a temporary capacity and who failed to meet the requirements of long residence. This approach also accords with **E A** where the Upper Tribunal stressed 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.

21. Whilst the First-tier Tribunal made reference at the end of paragraph 40 to there being no compelling circumstances to lead her to consider "unvarnished" Article 8 outside the Rules, she did conduct an assessment of the second Appellant's best interests and the proportionality of her removal in paragraph 40. She took into account all relevant factors on both sides of the balance and it was open to her to find that notwithstanding the fact she had been in the UK for 7 years from birth, her removal was

proportionate in the light of her age, her adaptability and the immigration status of her parents. In **Azimi-Moayed and Others (decisions affecting children; onward appeals)** [2013] UKUT 197 (IAC) the Tribunal summarized the best interests of the child and noted, at paragraph 13 (iv) that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable. The decision of the First-tier Tribunal accorded with this observation.

22. Mr Bellara also argued that the First-tier Tribunal should have remitted the second Appellant's case to the Secretary of State for a lawful assessment under section 55 BCIA. Firstly, that was not a ground on which permission was sought from the First-tier Tribunal. Secondly, it was not recorded as a submission before the First-tier Tribunal nor was it argued in the Appellants' skeleton argument. Thirdly, it is clear from **MK (section 55 – Tribunal options) Sierra Leone** [2015] UKUT 223 (IAC) that where the Tribunal finds that there has been a breach of either of the section 55 duties, one of the options available is remittal to the Secretary of State for reconsideration and fresh decision. The Tribunal may decide not to remit where satisfied that it is sufficiently equipped to make an adequate assessment of the best interests of any affected child.

23. The Secretary of State considered section 55 of the BCIA in the second Appellant's refusal letter. The consideration was brief but there appears to have been little evidence submitted with the application. In any event, the First-tier Tribunal was not invited to find that there was a breach of section 55 or that the matter should be remitted. It was not a ground in respect of which permission was sought and it was open to the First-tier Tribunal to consider the best interests of the second Appellant on the evidence before her.

24. It is clear that the First-tier Tribunal did not conduct an assessment of the first and third Appellant's circumstances outside the Immigration Rules. The grounds argue that the First-tier Tribunal's findings outside the Rules are materially flawed in respect of the second Appellant and consequently the other Appellants. In **Singh and Khalid v SSHD** [2015] EWCA Civ 72 the Court of Appeal opined at paragraph [64] "there is no need to conduct a full separate examination of Art 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in the consideration under the Rules." It is not argued that the First-tier Tribunal should have conducted a separate examination of the first and third Appellants' case outside the Rules save for in relation to the second Appellant.

25. The Appellants also argued that the First-tier Tribunal erred in finding that the third Appellant used deception. The First-tier Tribunal's findings in relation to deception are at paragraphs 38 and 39 of the decision. She found that the DVR:

38. “established the evidence of deception to the higher degree and it is cogent evidence in support…. The DVR clearly concludes that the figures shown in the document produced by A3 had been inflated as compared with the true account movement, although those figures were not given. There is no doubt that officials made these enquiries with the bank and there is sufficient information in the DVR to confirm this. The complaints made on behalf of A3 are simply unsustainable. The DVR can be relied on as evidence of deception.

39. I did not find the evidence of A3 to be credible or reliable. I place little weight on the email purporting to come from the bank. The respondent had no opportunity to consider the same and there is nothing on the document to indicate that it is from the bank Bradesco. I find his account of having made contact with his bank is wholly lacking in credibility and unsupported. He has provided no credible explanation for the increased figures produced by him in the bank statement. I am satisfied that A3 relied on deception in support of his application under the PBS. I dismiss the appeal under paragraph 322.

26. The Respondent refused the third Appellant’s application because it was said he had used deception in his application by submitting a false bank statement which had been confirmed to be false by the issuing authority. The application was therefore refused under paragraph 322 (1A) of the Immigration Rules.

27. The document verification report is in the Respondent’s bundle. The document centre overseas request form gives the third Appellant’s name, bank name, account number, account number and appends two financial scanned documents the content of which is not included. According to the detailed verification results the verifier who works at the British Consulate in Rio De Janeiro concluded that the bank document was false. According to the Respondent’s contact history the contact detail for the bank was searched online. An official from the bank answered the phone and asked to receive the documents by email. Later, the same official confirmed that the letter was not an accurate. The name and number account did match what they had on their systems but the account movement involved higher amounts than the real account had. According to the report, the information provided was the Appellant’s bank name, account number and the balance of R$13,334,14. The information verified was the Appellant’s name, account number but the balance did not match the information provided.

28. It is of note that the bank statement provided by the third Appellant with his application showed a final balance of $13,334,14 and his name and bank account number on the bank statement correspond with the information said to have been provided by the Respondent to his bank. I find that the First-tier Tribunal was entitled to find on the basis of this evidence that the officials made these enquires with the bank and there was sufficient evidence in the DVR to confirm this. She considered the evidence that the third Appellant had produced in rebuttal. That evidence is described at paragraph 33 of the decision. The Appellant said that he had

telephoned his bank in Brazil a month before and spoken to the manager whose name he did not know. He received an email from the bank in Portuguese which was not before the First-tier Tribunal at the hearing. He submitted it with a translation after the hearing. He said that if any authority had checked his bank he would have been sent notification.

29. It is clear that the First-tier Tribunal took that evidence into account at paragraph 39 of the decision and found it wanting and gave adequate and sustainable reasons for that finding. The Appellant had not produced any supporting evidence to show that he had spoken to his bank a month before and hence she was entitled to find that his account was unsupported. The post-hearing evidence consisted of an email with an uncertified translation and she was entitled to find that the evidence was insufficient to demonstrate that it was from the third Appellant's bank and to attach little weight to it. On the basis of this evidence, her finding that the third Appellant had provided no credible explanation for the increased figures in the bank statement was open to her.

30. In **R(on the application of Giri)** [2015] EWCA Civ it was held that the statement in **JC (Part 9 HC 395 – burden of proof – China)** [2007] UKAIT 27 that, in relation to a question of deception, the standard of proof would be at the higher end of the spectrum of balance of probability, was incorrect. The standard to be applied is the civil standard. The more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. The First-tier Tribunal's self-direction with regard to the standard of proof was correct in respect of the requirement for the need for cogent evidence but arguably she placed too high a burden on the Respondent in stating that the deception needed to be proved to "a higher degree". However, as the Respondent asserts in the R24 response, if she found that the Respondent had demonstrated the deception to a higher standard than required that only went in the third Appellant's favour. For those reasons therefore, I find that the First-tier Tribunal did not err in her finding in relation to deception.

Conclusions:

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

I do not set aside the decision and the Appellants' appeal is dismissed.

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

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the

appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge L J Murray