IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/37145/2014
IA/37157/2014
IA/37151/2014

THE IMMIGRATION ACTS

Heard at Field House
On 30th November 2015

Decision & Reasons Promulgated
On 21st December 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

BM (FIRST APPELLANT)
IM (SECOND APPELLANT)
UM (THIRD APPELLANT)
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr H Kannangara of Counsel, instructed by Jade Law Solicitors
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

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Introduction and Background

1. The Appellants appeal against a decision of Judge Thanki of the First-tier Tribunal (the FTT) promulgated on 22nd April 2015.

2. The Appellants are citizens of Mauritius. The First and Second Appellants are married and are the parents of the Third Appellant who was born in the UK on 8th August 2005.

3. The Appellants applied for leave to remain in the UK based upon their family and private life rights. The applications were refused on 3rd September 2014.

4. The appeals were heard together by the FTT on 30th March 2015, and dismissed under the Immigration Rules, and with reference to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the rules.

5. The Appellants applied for permission to appeal to the Upper Tribunal. The application was refused by Judge Kelly of the FTT who noted that the Appellants disagreed with the reasons for refusal, but found that the grounds did not identify any errors of law. It was found that the question of whether it is "reasonable" for a child to leave the UK "is a matter of judgment for the Tribunal and, absent irrationality, it will not be interfered with on appeal." It was found that rather than identify any irrationality in the decision, the application for permission merely expressed disagreement.

6. The Appellants renewed their application for permission to appeal, and amended the grounds to contend that the decision of the FTT was irrational. It was submitted that the FTT, when considering whether it was reasonable for the Third Appellant to leave the UK, should have arrived at a different decision, given the fact that the Third Appellant had been born in the UK, had resided in the UK all his life, which was in excess of nine years, and had educational, social, family and cultural ties to the UK.

7. It was accepted that the First and Second Appellants had overstayed and had been without leave in the UK since 30th November 2010, but it was submitted that the Third Appellant, as a child, should not be penalised for this. Reliance was placed upon JO and Others (Nigeria) [2014] UKUT 00517 (IAC).

8. Permission to appeal was granted by Deputy Upper Tribunal Judge Archer who found, *inter alia*;

> "The judge found at paragraph 42 that the principal issue was the best interests of the Third Appellant and whether it was unreasonable to expect him to relocate to Mauritius. However, the judge then found that Appendix FM and paragraph 276ADE are a complete code and that 'the private life rights acquired since 2010 must be disregarded.' The judge found at

> paragraph 46 of the decision that it was in the best interests of the Third Appellant to return to Mauritius with his parents but did not balance that option against the benefits to the Third Appellant of remaining in the UK with his family.
>
> I find that it is arguable that the judge has erred in law by finding that Appendix FM and paragraph 276ADE are a complete code. It is also arguable that the judge has erred in law by disregarding private life for all of the Appellants since 2010 because section 117B(5) refers to giving little weight to private life established by a person at a time when the person's immigration status is precarious rather than simply disregarding such private life. In relation to the Third Appellant it is arguable that the judge has erred in law by disregarding private life since 2010 because section 117B(6) is arguably wholly independent from section 117B(5) and the key issue in 117B(6) is the reasonableness of expecting the child to leave the UK. Arguably, the assessment of reasonableness requires an analysis of all the circumstances of the Third Appellant in the UK rather than disregarding developments since 2010.
>
> I find that it is also arguable that the best interests assessment is inadequate because the judge has assumed that the only way for the Third Appellant to remain with his parents is to return to Mauritius with them."

9. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending, in summary, that the judge had considered the best interests of the Third Appellant, and properly considered whether it was reasonable to expect him to leave the UK. In relation to the use of the word 'disregarded' instead of 'little weight,' it was submitted that the challenge was semantic and not material. It was submitted that the decision of the FTT should stand.

10. Directions were subsequently issued making provision for there to be a hearing before the Upper Tribunal to decide whether the FTT decision should be set aside by reason of error of law.

The Appellants' Submissions

11. Mr Kannangara relied upon the grounds seeking permission to appeal, and the grant of permission by Judge Archer. Reliance was also placed upon a skeleton argument contained at pages 140-145 of the Appellants' bundle. The Tribunal had received confirmation from the Appellants' solicitors that the Third Appellant had become a naturalised British citizen on 23rd November 2015 although Mr Kannangara accepted that this was not relevant to consideration of error of law, as the naturalisation had not taken place when the appeal was heard before the FTT.

12. In summary Mr Kannangara submitted that the FTT had erred when considering reasonableness pursuant to paragraph 276ADE(iv) in relation to the Third Appellant, by only concentrating on the educational system in Mauritius and finding that the Third Appellant would not be materially disadvantaged by being educated in Mauritius.

13. It was contended that the FTT had not considered the private life established by the Third Appellant in the UK, and not taken properly into account, the fact that he was born here and had lived here all his life. The FTT had not referred to case law relied upon by the Appellants, that being LD (Zimbabwe) [2010] UKUT 00278 (IAC), MK (India) [2011] UKUT 00475 (IAC), and Azimi-Moayed [2013] UKUT 00197 (IAC).

14. It was submitted that the FTT had erred in paragraph 47 of the decision by stating that Appendix FM and paragraph 276ADE are a complete code.

15. It was submitted that the FTT had further erred, in that having found against the Third Appellant having considered paragraph 276ADE(iv) which provides that an individual must be under the age of 18 years and have lived continuously in the UK for at least seven years, and there must be a consideration of whether it would not be reasonable to expect the individual to leave the UK, the FTT should have gone on to consider Article 8 outside the rules.

16. Mr Kannangara submitted that the FTT had not properly considered proportionality outside the Immigration Rules, and was wrong to state in paragraph 47 "that the private life rights acquired since 2010 must be disregarded". Mr Kannangara submitted that the FTT had in effect "stopped the clock" in 2010 and not considered private life since that date which was an error.

The Respondent's Submissions

17. Mr Duffy submitted that paragraph 276ADE(iv) is in fact a complete code when a child has acquired seven years' continuous residence. If a child has not completed seven years, then this would not be a complete code.

18. Mr Duffy pointed out that the FTT had correctly found that there would be no interference with the family life established by the Appellants because it was proposed to remove the family together. The issue before the FTT was therefore whether it would not be reasonable to expect the Third Appellant to leave the UK, taking into account the fact that he was born here, and had lived here for almost ten years' continuously.

19. Mr Duffy argued that the FTT had properly considered the issue of reasonableness under paragraph 276ADE(iv) and there was therefore no need to go on and consider the best interests of a child outside the Immigration Rules.

20. It was argued that the grounds seeking permission amounted to a disagreement with findings that had properly been made by the FTT.

21. With reference to paragraph 47 of the FTT decision Mr Duffy submitted that the FTT was considering the parents' private life, as the private life of the Third Appellant had already been considered earlier in the decision, pursuant to paragraph 276ADE(iv). Mr Duffy submitted that although

another judge may have made a different decision, that was not the test to be applied, and the decision of the FTT disclosed no material error of law.

The Appellants' Response

22. Mr Kannangara reiterated that the FTT had failed to consider relevant case law which was referred to in a skeleton argument which had been before the FTT, and in particular the case law confirmed that seven years' residence after the age of 4 was the most important period and should be taken into account. It was argued that the FTT had not taken into account the Third Appellant's private life in its entirety, and had focused too much on education.

23. At the conclusion of oral submissions I reserved my decision.

My Findings and Conclusions

24. I note that the Appellants rely upon irrationality in the renewed grounds seeking permission to appeal. This involves a high threshold, and I do not find that the decision of the FTT is such that no Tribunal reasonably directed could have come to that conclusion. In my view, the FTT identified the relevant issues, considered those issues, and made findings which are supported by adequate and sustainable reasons. I will now explain in more detail why I conclude that the FTT decision discloses no material error of law.

25. The FTT identifies the core issue in these appeals at paragraph 42, that being whether it is unreasonable to expect the Third Appellant to relocate to Mauritius given his birth in the UK and the continued residence since.

26. The FTT was not accurate in paragraph 47 in describing Appendix FM and paragraph 276ADE as a complete code. This is not the case in non-deportation cases. The Court of Appeal considered this in SS (Congo) [2015] EWCA Civ 387 and stated in paragraph 47;

> "Therefore, as the court said in MF (Nigeria) at para [45], it is a 'sterile question' whether one is dealing with a 'complete code' case or a case falling to be addressed in the context of a part of the Immigration Rules which does not constitute a 'complete code.' The basic, two-stage analysis will apply in both contexts."

27. In paragraph 33 of SS (Congo) the Court of Appeal stated that compelling circumstances would need to be identified to support a claim for a grant of leave to remain outside the new rules in Appendix FM.

28. On this issue, I accept the submissions made by Mr Duffy that in this case paragraph 276ADE(iv) can be regarded as being complete, and not requiring an assessment outside the Immigration Rules, if a comprehensive assessment is carried out as to whether it would be

reasonable to expect the Third Appellant to leave the UK, and which involved assessing the best interests of the child.

29. The fact that the FTT did not specifically refer to the case law relied upon by the Appellants in relation to the best interests of the child is not without more an error of law, provided the correct legal principles have been followed in making the decision.

30. The FTT recognised and stated in paragraph 44 that the best interests of a child is a primary consideration but not the only consideration. In my view, the FTT assessed the issue of reasonableness and the best interests of the child, taking into account the evidence and submissions made by both parties.

31. I do not find that the FTT concentrated in the main on education, although this was a significant consideration placed before the FTT. The FTT stated in paragraph 42 that it was recognised that the Third Appellant had been born in the UK, and continued to reside here since birth. That important factor was therefore not overlooked but given due consideration. The FTT also noted that the Third Appellant was established in education (paragraph 43).

32. While the FTT recognised that the First and Second Appellants had been in the UK without leave since 30th November 2010, it was recorded at paragraph 46 that the Third Appellant was not to be blamed for this. The FTT relied upon the recent and appropriate authority, that being EV (Philippines) [2014] EWCA Civ 874. The FTT could also have relied upon Zoumbas [2013] UKSC 74 which preceded EV (Philippines), and contained similar principles. In paragraph 24 of Zoumbas the Supreme Court found no irrationality in a conclusion that it was in the childrens' best interests to go with their parents to the Republic of Congo, taking into account that the children were not British citizens and had no right to further education and healthcare in this country and they were of an age when their emotional needs could only be fully met within the immediate family unit. At paragraph 25 the Supreme Court found that it was legitimate for a decision maker to consider first whether it would have been proportionate to remove the parents if they had no children and then, in considering the best interests of the children in the proportionality exercise, ask whether their well-being altered that provisional balance.

33. I can ascertain no material factor that has not been considered by the FTT when considering reasonableness and the best interests of the child, and do not find that any immaterial factors have been considered. I do not find that it is correct to state that the FTT did not consider the Third Appellant's private life after 2010. This is clearly wrong if one reads paragraph 42 which accepts that the Third Appellant was born on 8th August 2005 and had at the time of his application seven years continuous residence in the UK, which was only acquired post-2010, and if one also considers paragraph 44. In that paragraph the FTT considers evidence

from the head teacher of the Third Appellant's school, which confirms that he had attended since 12th September 2012. There is also consideration of the letters of support, which refer to periods of time post-2010. In my view it is therefore not correct to say that the FTT focused upon education when considering the Third Appellant's private life to the exclusion of all else. It is clear that the FTT have considered the letters of support which deal with the Third Appellant's life outside school as well as in school. I do however find that one of the major issues relied upon on behalf of the Third Appellant, did relate to the fact that his education would be disrupted if he had to leave the UK, and therefore the FTT had to consider in detail that issue.

34. In conclusion the FTT adequately considered both the best interests of the child, which would be to remain with his parents, and the issue of reasonableness, when paragraph 276ADE(iv) was considered. I do not discern any material error of law in that consideration.

35. Therefore because reasonableness and best interests of the child were adequately considered under the Immigration Rules, there was in my view no need for the FTT to go on and consider Article 8 outside the rules in relation to the Third Appellant. If Article 8 was considered outside the rules, section 117B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) would have to be considered, and this would include section 117B(6) which involves the issue of reasonableness, which is the same test as under paragraph 276ADE(iv). In any event, the FTT did go on in paragraph 47 to consider Article 8 outside the Immigration Rules. The FTT did err in concluding that private life rights acquired since 2010 must be disregarded. The FTT should have recorded pursuant to section 117B(4) that little weight should be given to a private life established by a person at a time when the person is in the UK unlawfully, and pursuant to (5) little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

36. The private lives of the First and Second Appellants have always been precarious since their arrival in the UK as they have only ever had limited leave. Their immigration status has been unlawful since 30th November 2010 because they have had no leave.

37. I do not find that the error is material. This is because the private life of the Third Appellant was not disregarded. In relation to the First and Second Appellants, they could only succeed under Article 8 outside the Immigration Rules if there were compelling circumstances which would need to be identified to support a claim for a grant of leave to remain outside the new rules (paragraph 33 of SS (Congo)). In this appeal the FTT found, correctly, that the private life claims of the First and Second Appellants relied upon the Third Appellant's claim. I can ascertain no evidence of compelling circumstances in relation to the First or Second Appellants, that was placed before the FTT.

38. In conclusion the decision of the FTT was not irrational. The best interests of the child were adequately considered together with the question of whether it would be reasonable for him to leave the UK. The findings made were supported by sustainable reasons. The FTT did not disregard the Third Appellant's private life after 2010 and did not materially err on the facts of this case, in describing paragraph 276ADE as a complete code although that would not always be the case. There was no material error in the consideration of Article 8 outside the Immigration Rules.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision must be set aside.

I do not set aside the decision. The appeals are dismissed.

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

No anonymity direction was made by the First-tier Tribunal. However because these appeals have involved considering the best interests of a child I have made an anonymity order pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

Unless and until a Tribunal or court directs otherwise, the Appellants are granted anonymity and no report of these proceedings shall directly or indirectly identify them. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 3rd December 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeals are dismissed. There is no fee award.

Signed Date 3rd December 2015

Deputy Upper Tribunal Judge M A Hall