IAC-PE-AW-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/41915/2014
IA/41919/2014
IA/41921/2014
IA/41924/2014
IA/41927/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th November 2015	**On 29th December 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAIRD

Between

MISS LUMJETA K (FIRST APPELLANT)
MR DIAMANT N (SECOND APPELLANT)
LK (THIRD APPELLANT)
RK (FOURTH APPELLANT)
ZK (FIFTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Reynolds, Counsel
For the Respondent: Ms N Willocks-Briscoe – Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants, the first two of which are the parents of the other three, are citizens of Kosovo. They appeal against the determination of First-tier Tribunal Judge Lawrence issued on 29th April 2015 dismissing their appeals against the decision of the Respondent made on 3rd October 2014 to refuse leave to remain and to remove them from the United Kingdom.. The Secretary of State dealt with the application under Appendix FM and Paragraph 276ADE of the Immigration Rules. The Judge heard evidence only from the first Appellant, Miss K although the others apparently were in the court building. .

2. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 7th July 2015. He said:

> "2. It is arguable that the Judge has failed to give sufficient attention and weight to the private life of two of the child Appellants who were both born in the UK and were 9 and 8 years old at the time of the appeal. Both have been in the United Kingdom in excess of seven years.
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> 3. It is arguable that the Judge has erred in giving weight to the fact that the children have established their private life whilst in the UK unlawfully.
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> 4. The ground in respect of the Judge's consideration of the expert evidence of Mr Robert Simpson is less compelling but I do not reject it."

3. The appeal proceeded on human rights grounds outwith the Rules.

4. The immigration history of the family can be summarised as follows.

5. The first and second Appellants had attempted to enter the UK without leave but were refused entry and removed on 14th April 2006. It is assumed that they re-entered the UK illegally shortly after that, given the date of birth of their eldest child on 29th August 2006. On 15th October 2013 after the eldest child had been in the UK for seven years the first Appellant sought to regularise her immigration status by making an application outside the Rules. She named the other four Appellants as her dependants.

6. It is submitted in the grounds seeking permission that Judge Lawrence made the following errors in law:

   (i) He failed in his statutory duty to have regard to the provisions of Section 117 of the Nationality, Immigration and Asylum Act 2002 in particular Section 117B(6). The two older children were 9 and 8 years old at the time of the appeal. These children were qualifying children for the purposes of Section 117B(6) because they had lived in the United Kingdom for a continuous period of seven years or more. The issue was raised before the Judge as to whether it would be reasonable for the children, having integrated into the UK, to return with their parents to Kosovo. The Judge failed to address this test. Instead he relied upon **EV (Philippines) and Others v SSHD**

[2014] EWCA Civ 874. He also erred in finding that the children had established their private life whilst in the UK unlawfully was a determining factor in finding that fact. He cited **ZH (Tanzania) v SSHD [2011] UKSC 4** as authority for the fact that the children should not have their immigration status held against them. Their parents were responsible for this, not them.

(ii) He made a clear mistake regarding a material fact in assessing the evidence of Mr Robert Simpson a forensic social worker. Mr Simpson had said that the children "identify more or less strongly with their ethnic group". He did not say in his report that the first Appellant's children strongly identified with their Kosovan ethnicity. The Judge misinterpreted what Mr Simpson had said. The children are thriving in the cultural environment of the UK. He did not take this into account. Additionally the Judge failed to take into account a number of other conclusions made by Mr Simpson regarding the impact on the Appellant children. The Judge indeed made findings contradictory to these conclusions one of which was the expressed concern of the children as to how they would be able to communicate at school if no English was spoken because that is the only language they speak. It was stated that they do not speak Kosovan Albanian.

7. Judge Lawrence gave a great deal of consideration to this case. He considered the private life of the Appellants. He considered the best interests of the children. It may well be that he misunderstood what Mr Simpson said about the extent of their identifying with their ethnic group. With regard to the issue of what languages they speak the Judge noted that the oral evidence of the first Appellant was that the children do understand their native tongue and that that language is spoken at home by the adults. He found it therefore to be inconceivable that the children are not familiar with their mother tongue. He said it was inconceivable that once they entered the UK the family only spoke English amongst themselves. The first Appellant gave evidence in Albanian. He pointed out that Mr Simpson had come to the view that the children are not able to understand their mother tongue on what he was told or observed at the interview. The Judge relied on the decision **Azimi-Moayed and Others (decisions affecting children; onward appeals) [2013] UKUT 00197** in which the Tribunal set out certain guidelines and said that 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 UK then this suggests that dependent children who form part of their household should also be removed unless there are reasons to the contrary. It was also said in that case that apart from the terms of published policies and Rules, the period of seven years from age 4 is likely to be more significant to a child than the first seven years of life. It was said, "Very young children are focused on their parents rather than their peers and are adaptable". This followed another finding that:

> "Lengthy residence in a country other than the State of Origin can lead to development of social, cultural and educational ties that would be inappropriate to disrupt, in the absence of compelling reasons to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as the relevant period."

8. The Judge considered this and found that attending English education at the level they were at and being exposed to culture provided by their parents at home would not prevent them accompanying their parents to Kosovo or that it would be a detrimental wrench to remove them from the UK. They are children and are not used to education other than English education but they are exposed to their own mother tongue at home, a fact which Mr Simpson appears not to have been aware of.

9. He then thoroughly went through the decision in **EV (Philippines)**. He reached the conclusion that there was nothing compassionate or exceptional which would render return of the family disproportionate to the legitimate aim of maintaining proper immigration control.

10. I heard oral submissions from Mr Reynolds and Ms Willocks-Briscoe. Mr Reynolds pointed out that the children were all born here. He went through the four errors of law. He relied on the decision of **Forman (ss 117A-C considerations) [2015] UKUT 00412** in which the Tribunal said that the list of considerations contained in Section 117B and 117C are not exhaustive and a Court or Tribunal is entitled to take into account additional considerations provided that they are relevant in the sense that they properly bear on the public interest question. In cases where the provisions of Section 117B-C of the 2002 Act arise, the decision of the Tribunal must demonstrate that they have been given full effect. The Judge failed to do this. He did not apply a test of reasonableness. He did not consider whether there are compelling reasons.

11. Ms Willocks-Briscoe relied on her Rule 24 response in which it is submitted that the First-tier Tribunal Judge directed himself appropriately, having carried out a careful analysis of the situation of the Appellants and particularly the children. He had paid close attention to the report of the independent social worker and his conclusions. It is submitted that the conclusions of the Judge fall squarely within the circumstances outlined in **Zoumbas [2013] UKSC 74** in which the Supreme Court said that in that case the children were not British citizens and had no right to future education and healthcare in this country. They were part of a close knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into UK society would have been predominantly in the context of that family unit. Ms Willocks-Briscoe submitted that the evidence has to be considered in the round. The children have not been here for seven years from the age of 4 or 5. Seven years is not a determinative period. It may well be that the Judge failed to

look at paragraph 117B. In all the circumstances this is not a material error.

12. I have given careful consideration to all the submissions made in this case. The Judge failed to consider paragraph 117B. It is difficult to see why the Appellants' representatives relied on **Forman** because the hearing in this case took place on 28th May 2015 and the Appellants' appeal was heard on 1st April so **Forman** was not in existence. There had of course in February been the decision in **Dube (ss 117A-D) [2015] UKUT 90** in which the Upper Tribunal made it clear that Judges are required statutorily to take into account the considerations set out in those Sections. What paragraph 117B(6) says:

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
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> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

13. I accept that the two older children in this case are qualifying children. I accept that the Judge failed to deal with Section 117B. I do however agree with Ms Willocks-Briscoe that in this case it is not material. The Judge gave a great deal of careful consideration to all the evidence before him and to the facts of this case. Firstly it is clear that the forensic social worker Mr Simpson was misled by the first Appellant. Clearly the children can speak Kosovan Albanian. The lack of the language of their parents' country of origin is not a factor to be taken into account. The Judge gave sound reasons for finding that it would be reasonable for the children to return to Kosovo citing appropriate case law. It is abundantly clear that this family entered the UK illegally and waited seven years before putting an application in. They were obviously aware of the law and waited for seven years to make the application in the knowledge that it would be more likely to be successful. This weighs heavily in an assessment of the public interest. I accept that it is not the fault of the children that their parents came here in the way that they did and took the action that they did but the family live together. They are a unit as described in **Zoumbas**. The parents were brought up in Kosovo. The children have presumably been exposed to their parents' culture and the decision that the Judge made that it would not be unreasonable for them to return to Kosovo with their parents was one that was open to him on the evidence before him for the more than adequate reasons given.

Notice of Decision

I find that there is no material error of law in the determination of the First-tier Tribunal and I uphold that decision.

Signed Date: 14th December 2015

N A Baird
Deputy Judge of the Upper Tribunal